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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.,
Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF NORTHWEST AIRLINES, INC.,

PHILIP A. LACOVARA
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036
(202) 862-7400

Attorney for Petitioner
Northwest Airlines, Inc.

Of counsel:

Gerald Goldman
David W. Spears
William R. Stein
Marcy J. K. Tiffany

CERTIFICATE UNDER SUPREME COURT RULE 28.1

Petitioner Northwest Airlines, Inc., has no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates.

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REPLY BRIEF OF NORTHWEST AIRLINES, INC.

I. THE ISSUE BEFORE THE COURT IS THE EXISTENCE OF A COGNIZABLE CLAIM TO CONTRIBUTION; ANY OTHER DEFENSES ARE PREMATURE.

A. Truth and Sufficiency of Allegations of Union Complicity.

At the threshold, both respondents seek to defeat Northwest's contribution claim (1) by renouncing responsibility for the purser-stewardess pay differential that underlies Northwest's complaint and (2) by denying that their conduct violated either Title VII or the Equal Pay Act. This case comes before the Court, however, on the basis of the unions' motions to dismiss Northwest's complaint for failure to state a legally cognizable claim (JA 39-41). For purposes of these motions, the unions and the Court must assume the truth of the

allegations in the complaint. *See, e.g., Miree v. DeKalb County,* 433 U.S. 25, 27 n.2 (1977); *Scheuer v. Rhodes,* 416 U.S. 232, 236-37 (1974). The relevant allegation of the complaint is that in collective bargaining each union regularly "demanded" continuation of that differential and that the union conduct perpetuated the differential throughout the entire backpay period (JA 17-18 ¶6).[1]

This allegation adequately establishes union complicity for the purpose of deciding whether, as a matter of law, an employer like Northwest may assert a contribution claim against unions like TWU and ALPA. Although TWU refuses to recognize the correctness of the decisions, it necessarily concedes that "there are precedents" that sustain union backpay liability for the conduct alleged (TWU Br. 19). *See also* Northwest's opening brief at 20 n.16. Moreover, the unions' motions to dismiss did not challenge the legal sufficiency of the allegations that the unions' conduct was actionable. Neither the district court nor the court of appeals had the opportunity to address the question. Thus, the existence of underlying union liability must be assumed here.[2]

B. Lack of Equity.

TWU's contentions that Northwest's claim should fail for lack of equity (Br. 23-31) similarly turn on issues of fact that

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[1] The unions struggle to undermine the related *Laffey* finding that in 1966 Northwest proposed to eliminate the differential but that TWU refused to agree to that change. *See* 366 F. Supp. at 767-68 (¶23). That proposal would have eliminated any basis for the backpay liability that has been fastened solely on Northwest. While admitting that it did oppose Northwest's proposal, TWU suggests that its agreement to the proposal would have violated the "downward equalization" prohibition of the Equal Pay Act, 29 U.S.C. § 206(d)(1). *See* TWU Br. 4.

That suggestion, however, is only a convenient afterthought. The prohibition applies only to "equal" jobs, but TWU admits that its insistence upon preserving the differential was based on the belief— shared with Northwest—that "the differential was still warranted by the [differing] duties and responsibilities of the purser and the stewardess positions . . ." (Br. 26).

[2] Furthermore, since the unions did not cross-petition for certiorari, they are improperly inviting the Court to order relief beyond what they obtained from the court of appeals. *See* R. Stern & E. Gressman, *Supreme Court Practice* 480, 481 (5th ed. 1978).

are outside the record and thus not a basis for decision at this stage. Those contentions, moreover, are subject to dispute. For example, TWU argues that contribution would not be equitable in this case because the unions "gained nothing" from the differential and that "the benefit inured only" to Northwest. (TWU Br. 23). The relative benefits from the challenged practices are not of record in this case, but the position asserted by TWU is demonstrably misleading.[3]

The argument is also just a distraction from the legal issue before the Court. TWU itself concedes that there are:

> "often . . . cases in which a black minority or females are denied advantageous terms of employment *for the benefit of a white majority or males who dominate the Union.*" TWU Br. 29-30 (emphasis added).

Thus, it is not relevant at this stage whether ALPA or TWU had independent incentives to discriminate. The point is that union leadership or majorities may well have such a self-interested motive. It is that incentive that contribution would curtail or neutralize.[4]

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[3] Throughout the backpay period, Northwest paid its stewardesses (as well as its male FSAs and stewards) approximately the same wages paid to the basic cabin attendant classifications on competing airlines, while the small group of pursers received about one-third more. *See, e.g.*, Declaration of Terry M. Erskine, Director of Labor Relations for Northwest, dated June 15, 1978, and filed in the district court in *Laffey* on June 20, 1978. Preservation of the differential financially benefitted only the individual male purser-members of TWU and ALPA.

[4] TWU also argues that it is somehow inequitable for a "non-profit" union to pay for the injury suffered by employees as a result of the union's wrongful activities. In providing for backpay awards against unions in Title VII, Congress has expressed its view that this responsibility is not at all inequitable. 42 U.S.C. § 2000e-5(f), (g). TWU's premise would also nullify the congressional judgment in statutes like the Labor-Management Relations Act of 1947, 29 U.S.C. § 160, and the Landrum-Griffin Act of 1959, 29 U.S.C. § 412, that union treasuries are answerable for injury inflicted by the union, even if the victims are themselves union members.

II. THE EEOC'S CURRENT POSITION ON CONTRIBUTION IS ENTITLED TO NO SPECIAL WEIGHT.

Two years ago the EEOC filed a 76-page brief as *amicus curiae* in the court below (excerpted *infra* in Reply App. A), arguing (1) that the federal courts have power to recognize a contribution remedy (Reply App. 5a-7a), (2) that "there can be little doubt that recognition of a right to contribution will further the enforcement of Title VII" (Reply App. 9a), and (3) that "nothing" in Title VII's charge-filing requirement "precludes, or conflicts with, the assertion of a claim for contribution by one joint violator of the Title against another" (Reply App. 10a). Before this Court, however, the EEOC has reversed field completely on these issues. The EEOC's 3-2 repudiation of its original unanimous position prompted Commissioner J. Clay Smith to issue a strongly worded dissent (reprinted *infra* as Reply App. B), explaining why "[n]othing has changed in law or in fact which warrants the Commission reversing this original position." (Reply App. 2b).

As this Court has seen, the EEOC surpasses any other agency in administrative inconsistency.[5] On several occasions the Court has criticized sudden reversals of EEOC position on issues of law. *See, e.g., Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 76 n.11 (1977); *General Electric Co. v. Gilbert,* 429 U.S. 125, 140-45 (1976); *Espinoza v. Farah Manufacturing Co.,* 414 U.S. 86, 94-95 (1973). This case, unfortunately, is another in this series. Since the EEOC's "position flatly contradicts what appears to be a rather careful statement of the Commission's views" only two years ago, the Court should "accord no special weight to its views." *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 858 n.25 (1975) (SEC). *See also Int'l Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 566 (1979).[6]

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[5] *See, e.g.,* Comment, *The Bennett Amendment—Title VII and Gender Based Discrimination,* 68 Geo. L.J. 1169, 1177-78 (1980), cataloging some of these inconsistencies.

[6] Neither the Solicitor General nor the EEOC has suggested that today's assessment of the impact of a no-contribution rule is based on any concrete experience showing that the two-year old position in favor of contribution was

(*footnote continues*)

Moreover, in order for the EEOC to claim any deference, its position "must be consistent with the congressional purpose." *Morton v. Ruiz*, 415 U.S. 199, 237 (1974). Courts "need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' " *Espinoza v. Farrah Manufacturing Co., supra*, 414 U.S. at 94-95. This is precisely such a case.[7]

III. THE COURT HAS THE POWER TO RECOGNIZE A CONTRIBUTION REMEDY FOR BACKPAY UNDER FEDERAL EMPLOYMENT DISCRIMINATION STATUTES.

A. Power to Fashion Equitable Remedies to Allocate Liability.

Respondent ALPA and several *amici* argue that federal courts lack the authority to recognize the equitable remedy of contribution for liability imposed under federal statutes unless the proponent of the remedy can demonstrate an affirmative congressional intent to permit contribution. The predicate for this proposition is *Cort v. Ash*, 422 U.S. 66 (1975), and other

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(*footnote continued*)

unfounded. In the absence of any demonstrable factual ground for changing a position that is, at bottom, based on predictions of impact, there is no basis for crediting the EEOC's new position. *See, e.g., Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954); *New Castle County Airport Comm'n. v. CAB*, 371 F.2d 733, 735 (D.C. Cir. 1966), *cert. denied*, 387 U.S. 930 (1967).

[7] Two commentators have recently written that the EEOC's announced rationale—to offer "immunity" to unions—"is political rather than legal, and should be addressed to Congress rather than the courts." C. Taylor & R. Charleston, *Contribution Would Promote Title VII, Pay Act Goals*, Legal Times of Washington, November 10, 1980, at 20, 21.

In a suit brought by Northwest under the Government in the Sunshine Act, 5 U.S.C. § 552b, the district court ordered release of the recording of the closed meeting at which the EEOC adopted its new position, but after the EEOC represented that those records would be of "tremendous benefit" to Northwest before this Court, the court of appeals stayed that order. *Northwest Airlines, Inc. v. EEOC* (D.D.C. Civ. No. 80-2192), *appeal pending* (D.C. Cir. No. 80-2342). The Chief Justice on November 14, 1980, declined to vacate the stay.

cases concerning implied "rights of action" for damages.[8] The focus on this line of cases, however, betrays a fundamental misconception about this case. In the "implied right of action" cases, this Court has been asked to require a party to respond in damages for a statutory violation when the statute itself did not impose monetary liability for that violation. As Mr. Justice Powell explained in *Cannon v. University of Chicago*, 441 U.S. 677, 746 (1979) (dissenting opinion), by creating a private action "a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve" and creates liability that Congress has not imposed.

In a contribution case like this one, the role of the federal court is fundamentally different. This case rests on the premise that Congress itself has imposed potential monetary liability on unions as well as employers for violation of the federal employment discrimination laws. In these circumstances, the Court has long affirmed the courts' responsibility for allocating the liability, even without express congressional direction. *See* Northwest's opening brief at 19-21, 40-42. For example, in *Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967), this Court held that "the courts must fashion an appropriate remedy" that allocates liability between employer and union where a "union's breach of duty will have enhanced or contributed to the employee's injury."

Where the undertaking is merely the fashioning of remedies among parties who are subject to statutory backpay liability, therefore, the methodology of *Cort v. Ash* and its progeny is not apt.[9] Once Congress made the underlying

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[8] *E.g., Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[9] Indeed, use of the *Cort v. Ash* factors to assess contribution claims would effectively bar any claim of contribution, since, as both the court below and Judge Higginbotham in *Glus* have noted, "the party requesting contribution, by definition, will never be a member of the class" for whose "especial benefit" the statute was enacted. *Glus v. G.C. Murphy Co.*, 23 F.E.P. Cas. 86, 91 (3d Cir. 1980), *petition for certiorari pending* (No. 80-461); *see Northwest Airlines, Inc. v. Transport Workers Union*, 606 F.2d 1350, 1354 (D.C. Cir. 1979) (Pet. App. 8d).

decision to impose backpay liability on unions for violating the employment discrimination laws, it left "remedial details to judicial implications." *Board of County Commissioners v. United States,* 308 U.S. 343, 349 (1939). Congress has necessarily assigned to the federal courts the "authority to embrace a dispute" about the allocation of financial liability between employers and unions that violate the employment discrimination laws. *Compare Cannon, supra,* 442 U.S. at 746.

This Court has often recognized the judicial responsibility to fashion remedies—or, in appropriate cases, substantive rules—as interstitial "federal common law" that fleshes out a statutory scheme.[10] In *Illinois v. Milwaukee,* 406 U.S. 91 (1972), for instance, although the "remedy sought by Illinois [was] not within the precise scope of remedies prescribed by Congress" in a statute, the Court held that a further remedy existed under the federal common law. 406 U.S. at 103. The Court stated that "the remedies which Congress provides are not necessarily the only federal remedies available." *Id.* Similarly, in *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957), the Court held that, once the federal courts were given jurisdiction over certain labor cases, they could formulate substantive and remedial rules as a matter of federal common law, and could fill in the interstices of the statute "by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." 353 U.S. at 456-57.[11]

The Court has not retreated from this definition of the proper judicial function. In *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19 (1979), for example, the Court

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[10] *See, e.g., Illinois v. Milwaukee,* 406 U.S. 91 (1972); *Vaca v. Sipes, supra; Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). *See generally* P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 770 (2d ed. 1973); Note, *The Federal Common Law,* 82 Harv. L. Rev. 1512, 1523 (1969).

[11] Just as with the labor statutes in *Lincoln Mills,* once Congress acted comprehensively in the field of employment discrimination, the federal courts acquired power to fashion federal common law remedies in the "penumbra" of federal statutes. *See* 353 U.S. at 457. The Court has already recognized that Congress has entrusted the federal courts with "plenary" remedial power to implement the employment discrimination statutes. *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 45 (1974).

explained the propriety of judicial fashioning of suitable remedies by noting that, when Congress pronounces conduct unlawful, it intends that "the customary legal incidents" of that determination will follow.[12]

B. Power to Recognize Contribution Remedy.

In this case, the Court is called upon to do no more than to apply the prevailing rule in this country regarding the allocation of concurrent liability. The Court has already exercised its power to formulate a contribution remedy in *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974). This case calls for approval of the application of the contribution rule in but another context governed by federal law.

Although many states first embraced the contribution principle by statute, the origin of contribution as the prevailing rule does not crimp the Court's remedial power. The courts may properly look to a steady legislative consensus in formulating the evolving common law of remedies. *Cf. D'Oench Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (federal common law may borrow from "all the sources of common law" and any "principles of established credit in jurisprudence"). The plain fact is that contribution is now the rule in almost all states and constitutes the "common law" rule on this issue. *See Glus v. G.C. Murphy Co.*, 23 F.E.P. Cas. 86, 88 (3d Cir. 1980); *Restatement (Second), Torts* § 886A (1979). As the EEOC itself emphasized in the court below when it urged recognition of contribution in this case, "the modern trend . . . has been to recognize a right to contribution under federal law." (Reply App. 6a). Indeed, ALPA and *amici* accurately concede that almost all courts that have faced the issue have concluded that contribution is appropriate for Title VII liability. *See* Northwest's opening brief at 38-39 & n.28.[13]

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[12] For these reasons, the reliance placed by ALPA and *amici* on *United States v. Standard Oil Co.*, 332 U.S. 301 (1947) and *United States v. Gilman*, 347 U.S. 507 (1954), is inapposite, since the government there sought to have the Court impose liability on a party upon whom Congress had not.

[13] It is difficult to credit the assertion of *amici* that contribution may not be recognized by a court in the absence of statutory authorization because it

(*footnote continues*)

To adopt contribution as a rule of obvious fairness designed to achieve "more equal distribution of justice," *Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., supra,* 417 U.S. at 111, the Court need only ascertain that contribution would not conflict with the policies of the federal employment discrimination laws. *See* EEOC brief below (Reply App. 5a-6a). *See generally* Note, *Toward a Workable Rule of Contribution in the Federal Courts,* 65 Colum. L. Rev. 123, 134, 137 (1965). As we discuss below, Northwest's claim satisfies that test.[14]

(*footnote continued*)

gives rise to too many difficult questions. Contribution emerged in about one-fourth of the states by judicial decision without the need for legislation. Courts often are required to resolve remedial issues similar to those presented by contribution, and do not decline to adjudicate questions simply because the decision may prompt additional questions. *See, e.g., Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 282 N.E.2d 288 (1972) (comparative fault).

Indeed, the federal courts that have adopted contribution in various contexts—including claims under the employment discrimination laws—have successfully dealt with many of the subsidiary issues characterized by *amici* as beyond judicial competence, including determination of the effect of a settlement. *See, e.g., Gomes v. Brodhurst,* 394 F.2d 465 (3d Cir. 1968).

[14] The willingness to recognize contribution has animated the lower federal courts in other contexts as well as this one. The adoption of contribution in Federal securities contribution cases cannot simply be dismissed by noting that the securities laws contain *some* express contribution provisions. As the EEOC pointed out in its brief in the court of appeals (at 24 n.10), "the decisions involving the right of contribution for implied causes of action under the Securities Acts rest ultimately upon remedial policy considerations." *See, e.g., Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163 (D. Del. 1974), *vacated on other grounds,* 535 F.2d 761 (3d Cir. 1976); *Globus, Inc. v. Law Research Service, Inc.*, 318 F. Supp. 955 (S.D.N.Y. 1970), *aff'd per curiam,* 442 F.2d 1346 (2d Cir.), *cert. denied,* 404 U.S. 941 (1971).

Conversely, of all the cases cited by ALPA and the government as declining to adopt contribution, only one, *McCain v. Clearview Dodge Sales, Inc.*, 574 F.2d 848 (5th Cir. 1978), appears to do so without qualification, but in an unreasoned *per curiam* opinion. Of the others, *Mataya v. Behm Motors, Inc.*, 409 F. Supp. 65 (E.D. Wisc. 1976), and *Stier v. Park Pontiac, Inc.*, 391 F. Supp. 397 (S.D. W.Va. 1975), rejected contribution only after applying the test that we propose. The courts found that contribution there would be inconsistent with the express provisions of the federal motor vehicle statute in

(*footnote continues*)

C. Federal Question Jurisdiction over Contribution Claim.

ALPA also reasons that the existence of a jurisdictional provision and "jurisdictional prerequisites" in Title VII precludes subject matter jurisdiction over Northwest's claim under 28 U.S.C. § 1331 or any other statute. ALPA Br. 32-36. Those provisions, however, are addressed to parties who assert that they have been victimized by a violation of Title VII and who seek relief directly under that statute. As Northwest explained in its opening brief (at 51-52), as the district court held (Pet. App. 9b), and as the EEOC itself explained in urging the Court below to sustain federal question jurisdiction over Northwest's contribution claim, Northwest is:

> "not asserting that there has been a violation of Title VII with respect to itself, but is instead asserting an

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(*footnote continued*)

question. *See* EEOC brief below at 25. Similarly, those courts that have denied contribution in antitrust cases have done so because of alleged conflict with statutory policies, not because of a lack of judicial power.

In *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952), the Court refused to allow contribution under the Longshoremen's and Harbor Workers' Compensation Act because contribution would have been inconsistent with the Act's express abrogation of any tort liability to employees on the part of stevedore-employers. This Court has recognized the general unfairness of a no-contribution rule and has gone far to confine the *Halcyon* holding in other cases like *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 417-21 (1969), and *Cooper Stevedoring, supra. See Dobbins v. Crain Brothers, Inc.*, 567 F.2d 559, 565 n.10 (3d Cir. 1977).

In the tax cases cited by the government, *DiBenedetto v. United States*, 1975-1 U.S.T.C. ¶9503 (D.R.I. 1974), and *Cohen v. United States*, 1975-1 U.S.T.C. ¶9391 (E.D. Mich. 1975), the courts rejected contribution for penalties imposed under I.R.C. § 6672 because the penalties were imposed for deliberate misconduct, and contribution has traditionally not been available for intentional torts. This was the same limited rationale for the decision in *Carriers Insurance Exchange v. Truck Insurance Exchange*, 310 F.2d 653 (4th Cir. 1962), a case involving the Interstate Commerce Act. These courts, however, did not reject the possibility of contribution in appropriate cases. In fact, the court expressly recognized in *Cohen*, 1975-1 U.S.T.C. at 86,967, that "*Cooper Stevedoring* can be read as permitting federal courts to apply the general rules of contribution unless there are policy considerations mitigating against such application."

> equitable right to be reimbursed for a financial loss it suffers due to the unlawful conduct of the party from whom contribution is sought." Reply App. 6a-7a.[15]

It is well established that "federal question" jurisdiction under § 1331 includes "claims founded upon federal common law as well as those of a statutory origin." *Illinois v. Milwaukee, supra,* 406 U.S. at 100; *see Bell v. Hood,* 327 U.S. 678, 682-83 (1946). Just as in this case, the federal common law claim in *Illinois* was related to an underlying statute, but the Court held, nonetheless, that the plaintiffs were not bound by the procedural or jurisdictional requirements of that statute and could seek extra-statutory remedies under § 1331.[16]

D. Jurisdiction without EEOC Charge against Union.

For similar reasons, the filing of an administrative charge against the unions, normally required before an aggrieved party may sue directly under Title VII, 42 U.S.C. § 2000e-5 (e), (f), is not a prerequisite to assertion of a common law claim for contribution. In its *amicus* brief in the court below, the EEOC recognized that:

> "the charge filing requirement of section 706 of Title VII . . . has no application whatsoever to the distinctly separate claim for contribution in which one wrongdoer asserts an equitable common law right to

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[15] The EEOC has recently reiterated its understanding that "the question of contribution . . . does not involve the substantive provisions of either Title VII or the Equal Pay Act." EEOC's Memorandum In Support Of Motion For Stay Pending Appeal at 8, filed on November 3, 1980, in *Northwest Airlines, Inc. v. EEOC* (D.C. Cir. No. 80-2342).

[16] 28 U.S.C. § 1337 supplies an alternative basis for federal jurisdiction over contribution claims arising out of Title VII or Equal Pay Act liability. *Cf. Tunstall v. Locomotive Firemen,* 323 U.S. 210 (1944); *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968).

Weinberger v. Salfi, 422 U.S. 749 (1975), involved a claim brought under a statute that *expressly* prohibited the exercise of § 1331 jurisdiction to hear claims arising under that statute. *See* 422 U.S. at 756-57. Title VII, of course, contains no such explicit prohibition against utilization of alternative jurisdictional bases. *Compare Johnson v. Robison,* 415 U.S. 361 (1974).

> reimbursement from another wrongdoer." Reply App. 10a.

It is, therefore, immaterial that a charge may not have been filed with the EEOC against the party from whom contribution is sought.

Many lower courts have recognized and applied this distinction.[17] Indeed, this Court has held that even an employee who claims to have been the victim of discrimination "is not limited to Title VII in his search for relief," but may pursue independently his "other remedies," without filing a Title VII charge. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975). The charge-filing requirement, therefore, cannot govern an employer's right to pursue his discrete common law claim for contribution.[18]

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[17] *See, e.g., Glus v. G. C. Murphy Co., supra*, 23 F.E.P. Cas. at 88 and n.11; *Grogg v. General Motor Corp.*, 72 F.R.D. 523, 528 (S.D.N.Y. 1976); *McDonald v. General Mills, Inc.*, 387 F. Supp. 24, 37-38 (E.D. Cal. 1974); *Osborne v. McCall Printing Co.*, 4 F.E.P. Cas. 276, 279 (S.D. Ohio 1972).

[18] Although the contribution claim is not a Title VII claim for purposes of the Act's special procedures, even the contrary assumption *arguendo* would not bar this suit. This Court, it is true, has occasionally used the term "jurisdictional" in referring to the charge-filing requirement. *E.g., Electrical Workers Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 239-40 (1976); *Alexander v. Gardner-Denver Co., supra*, 415 U.S. at 47. Lower courts, however, have not interpreted this expression to mean that the requirement is jurisdictional in the technical sense of subject-matter jurisdiction. Instead, they have held that the charge-filing requirement is analogous to a statute of limitations, and is subject to "equitable modification." *See, e.g., Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928 (5th Cir. 1975); *Sanchez v. Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Moore v. Sunbeam Corp.*, 459 F.2d 811, 826-27 (7th Cir. 1972).

Equitable modification would be particularly apt here if the Court were to hold for the first time that a contribution claim depends upon the filing of a charge against the union. There was no reason for Northwest, as an employer, to believe that an administrative charge would be a necessary prerequisite to a contribution claim against the unions. There is no provision anywhere in the statute for an employer to file a charge against a union that the employer believes may be jointly liable with it. Apparently, the Commission has never entertained a charge from an employer. *See* Reply App. 12a & n.30.

IV. CONTRIBUTION EFFECTUATES CONGRESSIONAL INTENT TO MAKE UNIONS LIABLE FOR CAUSING DISCRIMINATION.

A. Congress Did Not Intend to Preclude Contribution for Backpay Liability.

The absence of an express contribution provision in Title VII and the Equal Pay Act may not be viewed, as ALPA suggests (at 16), as a "purposeful decision [by Congress] to bar contribution." There is nothing in the language or legislative history of these statutes to suggest that Congress considered the issue of contribution, much less purposefully decided to preclude this remedy. ALPA's assertion disregards this Court's repeated warnings that "the failure of Congress expressly to consider a [particular] remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis, supra,* 444 U.S. at 18. *See also Cannon v. University of Chicago, supra,* 441 U.S. at 694.

As the Court held in *Transamerica,* Congress may be assumed to have left to the courts the definition of "the customary legal incidents" of its substantive action. 444 U.S. at 19. By the time the Eighty-eighth Congress passed the Equal Pay Act and Title VII in 1963 and 1964, contribution had already received widespread acceptance in this country as an equitable principle. *See* App. A to Northwest's opening brief. There is no reason to believe that Congress intended to foreclose the availability of that remedy under either of those statutes.

B. Congress Did Not Intend to Allow Unions to Be Immunized from Backpay Liability.

In the Court below, the EEOC stated firmly:

> "Not only does contribution further the policies evident on the face of Title VII, but it significantly enhances the underlying goals of the statute, as made clear in *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 417-18 (1975)." Reply App. 8a.

Neither the respondent unions nor the government can explain to this Court how virtual immunity from backpay liability will do anything more than gut what the Court in *Albemarle* said was the primary "spur or catalyst" to union compliance: the "reasonably certain prospect of a backpay award." 422 U.S. at 417-18.

The respondents—and now the EEOC—argue that unions should be protected from their share of Title VII liability if they manage to avoid being charged or sued by an employee. This argument promises substantial immunity from the consequences of a union's own discriminatory conduct, because a union possesses the capacity to influence or control an employee's choice of defendant by focusing the employee's grievance solely on the employer.[19] In addition, as the unions themselves point out, unions may act directly to select the employer as the sole defendant by filing an EEOC charge and initiating a suit. Unless a contribution claim is possible, this kind of "preemptive strike" would allow unions to pardon themselves for their own complicity, no matter how egregious. The unions' argument against contribution, therefore, is basically:

> "a claim for special treatment for unions and special immunity for the discriminatory practices in which they engage. This claim has no support in equity or law." *EEOC v. Steamfitters Local 638,* 542 F.2d 579, 585 (2d Cir. 1976), *cert. denied,* 430 U.S. 911 (1977).

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[19] The very basis for the development of the law of contribution was the inherent unfairness in allowing ultimate allocation of liability to depend on "the caprice or whim of the plaintiff, or his deliberate intention to fasten liability on one defendant alone." *Knell v. Feltman,* 174 F.2d 662, 665 (D.C. Cir. 1949). Yet that is exactly the result desired by the unions.

ALPA suggests that, to the extent a union colludes with an employee in suing an employer, a court can adjust the employer's backpay liability to take into account "unclean hands." But this possibility is illusory, since full backpay against the employer will have to be awarded except in exceptional circumstances, *see Albemarle Paper Co. v. Moody, supra.* Moreover, ALPA's approach penalizes employees without imposing any sanction on the offending union.

Such a claim, in fact, contradicts the express congressional intent that unions share liability with employers and be treated equally with them.

Nothing has happened in the sixteen years since Congress made this decision that would justify judicial creation of immunity for the entire labor movement from the "spur or catalyst" designed by Congress. Despite the glowing picture of altruistic union initiatives painted by ALPA and by the union *amici*, TWU candidly confesses to an attitude that is hardly unique among unions and their members today. TWU admits to this Court that it feels no obligation to attempt to eliminate discriminatory treatment:

> "Union officers must be democratically elected under the LMRDA and responsive to the desires of the membership. They may not wish to pay dues to enforce Title VII rights." TWU Br. 18-19; *see also id.* 17, 27.

By deciding that unions should face real backpay exposure, Congress has already made the judgment about how best to deter the attitude of indifference—or worse—illustrated by TWU's comments. Arguments that implementing this liability through a contribution remedy would undermine deterrence, therefore, fly in the face of the balance already crafted by Congress. Without contribution, the "spur or catalyst" that Congress intended to apply to unions becomes a chimera.[20]

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[20] Attempts to drag into this case the debate about whether contribution in the antitrust context is a greater deterrent than a no-contribution rule (*see* U.S. Br. 24-25) overlook a fundamental distinction. An antitrust violator has no way of predicting whether he will be singled out for suit. Since he has an equal chance of being targeted, his prospect of full treble-damage exposure operates as a deterrent. By contrast, if there can be no contribution under the employment discrimination laws, unions have a unique basis—not shared by potential defendants in other contexts—to expect that they may influence the direction of an employee's grievance so as to avoid liability altogether.

Moreover, as the unions themselves point out, labor negotiations, unlike antitrust conspiracies, exist in the context of a duty to reach an agreement (TWU Br. 13-15). Because of the exigencies created by this circumstance,

(*footnote continues*)

As the district court found (Pet. App. 16b) and as the EEOC argued below (Reply App. 8a-9a), therefore, there can be no serious question that the remedy of contribution protects the vitality of the deterrent designed by Congress. In a similar setting, this Court has rejected a rule laying the complete financial burden at the employer's feet because it would provide "slight deterrence, indeed, to future union misconduct." *Vaca v. Sipes, supra,* 386 U.S. at 187.

C. Contribution Does Not Conflict with the Remedial Scheme of Title VII.

1. **Title VII administrative procedures.** A claim for contribution, in the words of the EEOC, is not a claim of a "person aggrieved" by a Title VII violation but is instead "distinctly separate from, and involves different rights than, a cause of action under Title VII" (Reply App. 10a). *See* pp. 11-12 *supra.* Therefore, as the EEOC said below and as the lower courts have recognized, the procedural requirements of Title VII are "simply inapplicable to such a claim." (Reply App. 7a).[21]

Non-Title VII claims deriving from conduct that is also unlawful under Title VII may be asserted without regard to the procedural requirements of Title VII. *See Johnson v. Railway Express Agency, Inc., supra; Alexander v. Gardner- Denver Co.,* 415 U.S. 36, 48 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions"); 118

(*footnote continued*)

one party may be pressured into accepting a discriminatory contract provision that it otherwise would eschew. According to the complaint in this case (JA 17-18 ¶6), TWU and ALPA regularly demanded continuation of the differential that was held discriminatory in *Laffey*. Thus, unlike freely formed antitrust conspiracies, a discriminatory contract grows out of a compulsory relationship. In the absence of contribution, the party least likely to be sued—the union—will face little deterrent against pressing for illicit advantage.

[21] *See e.g., Jones v. Schramm,* 436 F.2d 899, 900-01 (D.C. Cir. 1970); *Newport Air Park, Inc. v. United States,* 419 F.2d 342, 346 (1st Cir. 1969); *see also Dawson v. Contractors Transport Corp.,* 467 F.2d 727, 732 (D.C. Cir. 1972).

Cong. Rec. 3962 (1972) (remarks of Sen. Javits); Reply App. 9a-10a.[22] Thus, there is no inconsistency between the remedial scheme of Title VII and the assertion of a federal common law claim for contribution for Title VII backpay liability.

2. **Conciliation.** Some of the briefs in opposition to Northwest's claim argue that a union that was not named in an EEOC charge cannot be a defendant in a subsequent contribution suit because it will not have been afforded an opportunity to engage in EEOC conciliation prior to suit. That argument overstates both the availability and the importance of conciliation to a party named in a charge.

Northwest itself did not even learn that an EEOC charge had been filed against it until it was served with the complaint initiating the *Laffey* case. The EEOC acknowledged below that the *Laffey* plaintiffs filed their suit against Northwest "before attempts by the Commission to conciliate the charges ...." (Reply App. 1a). As a result, even if TWU had been named in the charges filed with the Commission, the union would have had no more opportunity to engage in conciliation than Northwest had. The absence of such an "opportunity" for administrative conciliation is no more a legal bar to the unions' liability for contribution than it was a bar to the award of millions of dollars of backpay against Northwest.[23]

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[22] *See also* 118 Cong. Rec. 3372-73, 3965 (1972)(rejecting an amendment that would have limited available remedies for discrimination to those expressly provided in Title VII). *Compare Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979), where the Court held that a claim actionable only by virtue of Title VII could be asserted only through Title VII's procedures.

[23] It was not until the 1972 amendments to Title VII, Pub. L. No. 92-261, 86 Stat. 103, that the Commission became subject to the statutory obligation to serve the charge on the respondent within 10 days. As Chair Norton has admitted, the EEOC practice at the time the *Laffey* plaintiffs filed their charges against Northwest was not to serve the respondent until the EEOC completed its investigation. *See Oversight Hearing on Equal Employment Opportunities Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 21 (1977). Presumably, this explains why Northwest had no notice of the filing of the administrative charges before the *Laffey* plaintiffs demanded and obtained "right to sue" letters and actually initiated their backpay suit. *See* Reply App. 1a.

The "spur or catalyst" that should lead "employers and unions" to seek to eliminate discrimination is the reasonably certain prospect of a backpay award. *Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 417-18. The conciliation mechanism was not "intended to serve as a stumbling block to the accomplishment of the statutory objective." *Miller v. International Paper Co.,* 408 F.2d 283, 290 (5th Cir. 1969). The argument made by the unions would subordinate the Act's primary objective of stopping discrimination through the threat of a backpay award to the alleged "right to be cajoled and importuned" during conciliation. *Id.* That argument exalts procedure over substance.

Moreover, an employer seeking contribution cannot be fairly taxed with the consequences of a union's exclusion from the conciliation process. Congress expressly placed on the EEOC the responsibility to investigate and attempt conciliation; that burden does not rest with a charged party. *See* 42 U.S.C. § 2000e-5(b), (f)(1). This duty includes the responsibility "to identify" all parties "legally responsible and necessary for meaningful relief." *Trent v. Allegheny Airlines, Inc.* 431 F. Supp. 345, 350 (W.D. Pa. 1977), *dismissed after trial on other grounds,* 471 F. Supp. 488 (W.D. Pa. 1979). *Cf. Tipler v. E.I. duPont de Nemours & Co.,* 443 F.2d 125, 129 (6th Cir. 1971).

If the Commission had fulfilled its statutory duty to investigate and attempt conciliation in the *Laffey* case, the incumbent union would have been brought into any conciliation efforts. As the government assures the Court, the "EEOC involves a union in conciliation as a matter of course when it appears from the face of a charge that a collective bargaining agreement is involved." (U.S. Br. 29 n.26). *See* Section 62.7(c) of the *EEOC Compliance Manual* (CCH) (1979) (quoted *infra,* Reply App. 11a n.26). Differentials paid by a unionized employer are, of course, necessarily embodied in collective bargaining agreements. Thus, any conciliation initiated by the EEOC in a case like this one would give the union as much opportunity as the charged employer to resolve the dispute informally.

Courts have often recognized that the EEOC's failure to conciliate does not constitute legal prejudice to a private party and does not block a claim for backpay.[24] The failure to name a discriminatory union would not "impede the ability of the Commission to effect voluntary compliance," *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466-67 (5th Cir. 1970). There is, therefore, no reason to bar an employer's claim for contribution simply because the union did not have an opportunity to conciliate, an opportunity that history shows is at best a highly speculative benefit.[25]

3. **Prompt assertion of claims.** Contribution does not conflict with Title VII's policy of avoiding stale claims. If the union itself is named in the charge or sued by the original plaintiff, there can be no argument about interference with Title VII's policy of prompt resolution. When contribution is asserted in a subsequent lawsuit, the claim assumes that the employee's original grievance under Title VII was timely asserted. Even if the union was not named in the original

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[24] *See e.g., Russell v. American Tobacco Co.*, 528 F.2d 357, 365 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357, 361 (7th Cir. 1968).

[25] As a practical matter, as this case illustrates, a theoretical "opportunity" for conciliation does not rise to the level of importance that respondents and the *amici* would have the Court believe. The Commission has used conciliation very infrequently in the past, and has been successful with it even more infrequently. For example, in fiscal 1970—the year when the charges against Northwest were filed —of 14,129 new charges received, the Commission attempted to conciliate only 515. Equal Employment Opportunity Commission, *5th Annual Report, Appendix: Detailed Statistics on Charges*, at 63-64 (1971). Similarly, of the 623 conciliations completed by the Commission in fiscal 1970 (including both new charges filed and charges left over from previous years), only 353 were termed "successful" by the Commission. *Id.* at 64. Thus, concrete experience shows that the unions—and Northwest—would have had only the slimmest chance of resolving the *Laffey* charges through conciliation.

The present EEOC Chair recently admitted that the Commission's approach "made it difficult to achieve conciliation and early settlement, even when the parties were predisposed." *Hearings on the Equal Employment Opportunity Commission Before a Subcomm. of the Senate Comm. on Appropriations*, 96th Cong., 2d Sess. 625 (1980) (statement of Eleanor Holmes Norton).

charge, the union will, in the typical instance, have known about the charge filed against the employer and will have had an opportunity to participate in any conciliation proceedings.

The unions' contention here is nothing more than a challenge to the traditional rule allowing assertion of contribution claims after adjudication of the underlying complaint. Nothing in Title VII bars the prompt assertion of a contribution claim after an employee has convinced a district court, following a timely EEOC charge, that the employee was the victim of a discriminatory wage scale. *See* Northwest's opening brief at 45-50.

D. Effective Allocation of Liability Will Not Retard Enforcement.

A principal thrust of the briefs filed by the unions and the government is that unions must be offered immunity from the reasonably certain prospect of liability if they are to take seriously their independent statutory obligation under Title VII and the Equal Pay Act to combat employment discrimination. This argument is nothing short of brazen.

1. **Union enforcement.** Several union *amici* suggest that unions are moving on all fronts to root out discrimination and that exposure to contribution will only discourage this effort. Unfortunately, however, as Commissioner Smith pointed out in dissenting from the EEOC's new stance, "the majority of unions have not been in the vanguard in fighting discrimination." (Reply App. 5b). In *United Steelworkers v. Weber,* 443 U.S. 193, 198 n.1 (1979), this Court remarked that findings of union-caused discrimination "are so numerous" as to make this pattern "a proper subject for judicial notice." It remains true today, as it did when the Equal Pay Act and Title VII were enacted (*see* Northwest opening Br. at 17-20, 24-25, 36-37), that many unions continue to discriminate against minorities and women.[26]

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[26] Unions "still maintain discriminatory practices that have an adverse effect on the employment opportunities of minorities and women." U.S. Civil Rights Com'm. *The Challenge Ahead: Report on Equal Opportunity in Referral Unions,* i, 3, 5-16, 57-58 (May 1976).

(*footnote continues*)

The fact that *some* unions do not discriminate or may actively seek to combat discrimination does not justify the creation of blanket immunity from contribution, a result that would significantly reduce the prospect of backpay liability for *all* unions. To the extent a union does act affirmatively to enforce Title VII, a court may equitably adjust the amount of contribution it must pay.[27] At the same time the prospect of a contribution claim will give the necessary impetus to those unions that do not otherwise take seriously their statutory obligations.

The respondent unions suggest that any union complaints will be stymied by contribution counterclaims interposed only for delay or retaliation. District judges and the Federal Rules of Civil Procedure, however, surely are up to the task of filtering out any such claims against innocent unions. There is no reason for the Court to assume—especially in light of the liberal provision for attorney's fees, 42 U.S.C. § 2000e-5(k)—that unions will be impotent to fend off such hypothetical counter-attacks, except, of course, where the unions have in fact joined in the discrimination.

The recently adopted EEOC policy to encourage voluntary enforcement of Title VII in collective bargaining (U.S. Br. 1a-8a) does not support a no-contribution rule. That policy

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(*footnote continued*)

As we noted in our opening brief, in 1976, although 22% of union membership was female, women comprised only 8% of unions' governing boards. Br. at 37 n.27. More recent statistics show that this situation has not changed, and may even have worsened. In 1978, 24.2% of union membership was female, but women comprised only 7.2% of governing board membership. U.S. Department of Labor, Bureau of Labor Statistics, *Directory of National Unions and Employee Associations, 1979*, at 63 (September 1980) (Bull. No. 2079). *See also* E. Glassberg, N. Baden & K. Gerstel, *Absent From the Agenda: A Report on the Role of Women in American Unions*, 4, 12 (Coalition of Labor Union Women Center for Education and Research 1980). *See generally* H. Hill, *Black Labor and the American Legal System* (BNA 1977).

[27] *Compare Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974) (liability apportioned 100% to union because union principally responsible for plaintiff's loss), *with Burwell v. Eastern Air Lines, Inc.*, 458 F. Supp. 474 (E.D. Va. 1978) (liability apportioned 100% to employer because union acted in good faith to "whittle away" at discriminatory practices).

expressly turns on a *case-by-case* inquiry into good faith efforts by a specific union *or employer* to end discrimination (U.S. Br. 7a). This approach is certainly not consistent with blanket immunity for unions, both "good" and "bad." *See* Commissioner Smith's dissent (Reply App. 6b). In addition, this policy on its face is inapplicable to unions that have—as alleged in this case—continued to share full responsibility for the discriminatory wage scale. According to the findings in *Laffey*, respondents never objected to the propriety of the stewardess/purser pay differential. 374 F. Supp. at 1390. Permitting a contribution claim against unions in this setting can hardly conflict with an EEOC policy that, by its terms, requires action of "a compelling and aggressive nature" (U.S. Br. 7a) to end the discrimination.

In addition, the government's *amici* brief expressly concedes that the EEOC's new policy concerns only its own "prosecutorial discretion" and "cannot, and should not, immunize . . . unions from Title VII suits brought by private parties." (U.S. Br. 28 n. 24). Thus, whatever the impact of the EEOC's approach toward encouraging voluntary action, the policy poses no obstacle to a contribution claim against unions that at all times "demanded" adherence to a discriminatory wage package.

2. **Employee enforcement.** Neither Title VII nor the Equal Pay Act gives an employee complete discretion to control the ultimate allocation of liability, discretion that would be undermined by contribution. Unions themselves may file charges as "aggrieved parties" regardless of the wishes of the affected employee. This is so even where the employee recognizes that the union has been the prime mover in the discriminatory contract, not the employer. The EEOC too may initiate suits against employers or unions, regardless of the preference of individual employees.

In addition, the unions exaggerate the effect of a potential contribution claim on the willingness of employees to sue employers. Their argument unfairly assumes that aggrieved employees want so much to protect the treasuries of unions that

have conspired to discriminate that they would abandon grievances against the employers involved. Specific provision for union liability in several federal statutes demonstrates that Congress does not share this view of American workers. If an employee is discouraged from suing an employer because a union treasury may also become subject to backpay liability through a contribution claim, that is not the consequence of contribution, but of Congress' decision to make unions liable for their own complicity in employment discrimination.

Moreover, the unions ignore the fact that many victims of employment discrimination are not members of the unions that are responsible for the discriminatory practices. Illustrations of this fact are job applicants excluded by union-caused or union-assisted practices, former employees who bring an action against a union controlled by current employees (*see ALSSA v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974)), or employees suing an ousted union. In situations like these, the possibility that the employer may have a contribution claim against the union will not cause an employee to hesitate in challenging a discriminatory practice.

3. **Settlements.** Far from impeding settlements, a right of contribution will, as Judge Higginbotham concluded, "serve the Title VII policy of favoring ... settlement ...." *Glus v. G.C. Murphy Co., supra*, 23 F.E.P. Cas. at 92. As *Glus* illustrates, an employer may be more inclined to settle with employee-plaintiffs if it has a right to pursue a contribution claim against a union. The federal and state courts have encountered no difficulty adjusting contribution claims where one of the parties has settled the underlying claim. The familiar rules used by the courts in this situation reduce the non-settling party's exposure either *pro rata* on the basis of the total number of parties, or proportionately on the basis of relative fault. *See Gomes v. Brodhurst*, 394 F.2d 465, 469 (3d Cir. 1968).[28]

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[28] These adjustments will not encourage plaintiffs to go to trial against all defendants in order to "assure themselves full recovery," as the government suggests (U.S. Br. 30). This assertion ignores the basic rationale of settlement: the tradeoff between certain recovery of an acceptable amount now, and only the potential recovery of a possibly greater amount later.

Although the respondent unions and the government creatively spin out theoretical settlement problems, no one has suggested that contribution has actually discouraged settlement in the many contexts in which it is already the rule. Nor have they explained why contribution will have that effect uniquely in employment discrimination cases.

V. CONTRIBUTION IS ALSO WARRANTED FOR EQUAL PAY ACT LIABILITY.

A. Contribution Rests on Congressional Intent to Use Union Financial Liability under the Act as a Deterrent To Wage Discrimination.

The government notes in its *amici* brief that "[t]here is much to suggest that Congress intended that unions would be covered by the Equal Pay Act and held accountable under it in the same manner and to the same extent as employers." (U.S. Br. 17). In support of a contrary conclusion, respondents and the government offer *only* the fact that the Equal Pay Act was, at the last minute, tacked onto the Fair Labor Standards Act rather than left as a free-standing bill. But the government further concedes:

> "[N]othing in the legislative history of the Equal Pay Act reflects any awareness on the part of Congress of the tension between the expressed desire to hold unions accountable and the Act's adoption of the enforcement scheme embodied in the Fair Labor Standards Act." U.S. Br. 19.

In light of this unavoidable concession, can anyone really believe that Congress suddenly and silently renounced its explicit goal, manifested during two years of consideration, to make unions equally liable for the pay lost because of wage discrimination caused by unions?

Nor is there any force to the argument that contribution would conflict with the purpose of the Act by allowing an employer to reap an unfair advantage over business competitors. The Equal Pay Act was not intended to be a fair trade statute. The Act's "fundamental purpose" is the "same" as that

of Title VII, to combat "discrimination based on sex." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). The remedy provided in the Equal Pay Act is the same as the remedy under Title VII, backpay. Recognizing that discrimination is not solely caused by employers, Congress found it imperative to include unions in the coverage of the Act if the statute was to accomplish its purpose. The express coverage of unions forecloses any argument that an "unfair competition" rationale for the Act precludes either direct union liability or an equitable claim for contribution.[29]

The fact that the Equal Pay Act also provides for liquidated damages does not change the purpose of the Act or the nature of its remedy. The liquidated damage provision is not intended to be punitive or to be a special deterrent to unfair competition. In *Overnight Motor Co. v. Missel*, 316 U.S. 572, 583-84 (1942), and *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707-08 (1945), the Court explained that liquidated damages under the FLSA are *purely* compensatory and adjust for the intangible losses that a worker suffers from the deprivation of statutory pay. There is absolutely no support in case law or the legislative history for the government's suggestion that Congress may have intended that liquidated damages regulate levels of fair competition or deter violations (U.S. Br. 19).[30]

As this case illustrates, an Equal Pay Act violation need not involve any unfair advantage over competitors. The wage

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[29] While the government emphasizes that an employer's liability under the Equal Pay Act results in the employer's being "reduced to competitive parity and forced to disgorge unfair profits" (U.S. Br. 19), the same result occurs when backpay is awarded under Title VII. No one is so crass as to suggest that a major purpose of Title VII was to eliminate unfair corporate competition.

[30] On the contrary, the 1962 equal pay bill contained a provision which clearly assessed liquidated damages against both employers and unions. H.R. 11677, 87th Cong. 2d Sess. § 6(d) (as passed by the House, July 25, 1962) (108 Cong. Rec. H13809 (daily ed.)). Furthermore, any argument about whether unions themselves are liable for liquidated damages, either directly or through a contribution claim, is irrelevant here. The district court in *Laffey* has not awarded liquidated damages against Northwest.

differential found discriminatory in *Laffey* gave Northwest no advantage over its competitors, since the wages paid to Northwest stewardesses were approximately the same as those paid to cabin attendants on competing airlines. *See* n.3, *supra*. In a case in which an employer did gain some special advantage from a contractually established discriminatory wage scale, the trial judge might take that fact into account in equitably allocating contribution shares. The possibility of competitive advantage to some employers, however, is not a basis for immunizing all unions from Equal Pay Act liability, either in a suit by employees themselves or in an employer's claim for contribution.

B. Contribution for Equal Pay Act Backpay May Be Predicated on Union Liability under a Different Theory.

Contribution is permissible here even if the *Laffey* plaintiffs could not have sued TWU or ALPA under the Equal Pay Act. The unions' incurring of potential backpay liability by violating Title VII or their duty of fair representation exposes them to contribution once a court has invoked the Equal Pay Act to assess the employer for the *same* wage discrimination. The government acknowledges the general principle of contribution "that common liability need not arise out of a single statute or common law tort theory" (U.S. Br. 16 n.15).[31] The government nonetheless asserts that contribution would be "inappropriate" in the context of the sex discrimination laws. The rationale for this position is that it would "provide a means of invoking Title VII while circumventing its policy in favor of conciliation and voluntary resolution of disputes." *Id.* As we have already discussed, however, Title VII procedures are

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[31] Several cases have recognized the propriety of basing an employer's claim for contribution on the common liability of a union as a joint tortfeasor. *E.g., Lynch v. Sperry Rand Corp.*, 62 F.R.D. 78, 90 (S.D.N.Y. 1973); *Gilbert v. General Electric Co.*, 59 F.R.D. 267, 269-71 (E.D. Va. 1973); *Blanton v. Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162, 163-64 (N.D. Ga. 1970).

ALPA is wrong in asserting that Northwest did not raise below the argument that contribution may be premised on a union's liability for breach of its duty of fair representation. *See* Brief of Plaintiff-Appellee at 21-22, and Reply Brief at 6 n.* filed in the court of appeals.

inapplicable to a separate contribution claim. *See Johnson v. Railway Express Agency, Inc., supra,* 421 U.S. at 454.

Furthermore, even if the absence of an EEOC charge precluded an employee from suing a union directly under Title VII, the employee would have an independent claim under the federal common law duty of fair representation. Although this duty does not apply to employers, it lays the foundation for a contribution claim because contribution only requires common liability for the same injury, not common liability under the same cause of action. *See Vaca v. Sipes, supra.*[32] Where the common liability of the union rests on its breach of its duty of fair representation, contribution would be particularly appropriate since it would help enforce the policies of the federal labor statutes, as well as Title VII and the Equal Pay Act.

* * * *

Accordingly, as EEOC Commissioner Smith said in urging recognition of contribution under both Title VII and the Equal Pay Act (Reply App. 6b):

> "Simple justice demands, the principles of equity cry out, and the badges of history urge that no party to a collective bargaining agreement which violates the law should be placed in a preferred status . . . in connection with the contribution issue."

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[32]*E.g.*, in *Communications Workers v. Illinois Bell Tel. Co.*, 12 E.P.D. ¶11,275, at 5907 (N.D. Ill. 1973), the court recognized that a claim for contribution by an employer held liable under Title VII could be based on a union's liability for breach of its duty of fair representation. *See also Farmer v. Hotel Workers Local 1064*, 19 E.P.D. ¶9075, at 6633 , 99 L.R.R.M. 2166, 2187 (E.D. Mich. 1979); *Stevenson v. International Paper Co.*, 432 F. Supp. 390, 408 (W.D. La. 1977), sustaining the validity of this theory of contribution.

CONCLUSION

The Court should direct affirmance of the district court's refusal to dismiss Northwest's claim concerning Title VII backpay and should order reinstatement of the Equal Pay Act claim.

Respectfully submitted.

PHILIP A. LACOVARA
Attorney for Petitioner
Northwest Airlines, Inc.

Of Counsel:

Gerald Goldman
David W. Spears
William R. Stein
Marcy J. K. Tiffany

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REPLY APPENDIX A

EXCERPTS FROM BRIEF AS *AMICUS CURIAE* FILED BY EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN THIS CASE IN COURT BELOW ON JUNE 23, 1978 (*NORTHWEST AIRLINES, INC.* v. *TRANSPORT WORKERS UNION*, D.C. CIR. NOS. 78-1056, etc.)*

STATEMENT OF INTEREST [p. 1]

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is the agency established by Congress to administer, interpret and enforce Title VII of the Civil Rights Act of 1964 ****. This case presents questions concerning an employer's right to contribution from labor [p. 2] organizations for back pay liability arising under Title VII, the resolution of which may significantly affect the administration and enforcement of the Act. The EEOC is filing this brief pursuant to the Court's order of January 10, 1978, inviting it to participate in this case.

* * * *

The discriminatory salary differentials found unlawful in [p. 4] *Laffey* were a part of the collective bargaining agreements entered into from 1946 to 1972 between Northwest and the cabin attendants' successive unions. (App. 9). However, only Northwest was named in the charges, filed with the EEOC in March 1970, which formed the basis of the *Laffey* suit. On July 14, 1970, before attempts by the Commission to conciliate the charges, the *Laffey* plaintiffs obtained from the Commission a notice of right to sue, and, one day later, on July 15, 1970, they [p. 5] filed suit against Northwest. 366 F.Supp. at 775. (App. 4).

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* The *amicus curiae* brief filed by the Equal Employment Opportunity Commission in this case in the court of appeals is contained in the Record that has been transmitted to this Court.

SUMMARY OF ARGUMENT [p. 9]

1. The district court in this case held that there was a federal common law right to contribution for liability under Title VII against a person who was not named in an EEOC charge. In doing so, the court relied upon the consideration that recognizing such a right of contribution would serve the substantive and remedial policies of Title VII. Furthermore, the court held that it was appropriate to recognize such a right at federal common law since nothing in Title VII manifested an intent to preclude such a claim. The court applied the proper standard both in holding that it was appropriate to recognize a right of contribution for violations of the Title, and in holding that it was appropriate to recognize such a right at federal common law under 28 U.S.C. §1331.

* * * *

2. Recognizing a right to contribution for Title VII liability [p. 12] against a person who was not named in an EEOC charge is fully consistent with the substantive and remedial policies of the statute. The express terms of the Title manifest an intention to impose monetary liability on those persons responsible for violating its provisions, and specifically to hold labor unions responsible for their violations. Section 703 expressly prohibits unions from engaging in any discrimination proscribed by the Title, or from causing an employer to do so. Section 706(g) states that a party responsible for a violation should be liable for back pay, and that labor unions should bear such liability when they are responsible for the violation.

Furthermore, as the district court properly perceived, recognizing a right to contribution advances the primary purpose of Title VII. For, as the Supreme Court held in *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), the primary objective of Title VII—encouraging voluntary compliance with the law—is best served by insuring that all persons who may violate the Act are reasonably certain to be subject to monetary liability as a result. Permitting a party to assert a contribution

claim against another who has violated the Title, where that [p. 13]
person was not named in a charge through inadvertance or design, manifestly serves the primary, prophylactic purpose of Title VII. Accordingly, it is not surprising that most courts to rule upon the question have held that there is a right to contribution for Title VII liability.

3. Recognizing such a right to contribution is perfectly consistent with the intent of Congress in enacting the statutory scheme of Title VII. The legislative history of the Title establishes that the Act was not intended to preclude other claims arising out of the same conduct proscribed by the Title. * * * The case law also makes it perfectly clear that Title VII does not supplant other rights arising out of the same conduct. [Citations omitted.]

It cannot be inferred that claims for contribution constitute [p.14]
an exception to this policy, because there is no necessary inconsistency between the statutory scheme of Title VII and the assertion of a right to contribution for Title VII liability. This is because an employer seeking contribution is not asserting that it has been injured by conduct unlawful under the statute, but rather it is asserting an equitable claim to reimbursement, enforced at common law, from another wrongdoer who shares common liability. [Citation omitted.]

In short, a claim for contribution is not a Title VII claim. [Citation omitted.] Therefore, the charge-filing requirement of section 706 simply has no application to contribution claims.

* * * *

ARGUMENT [p. 19]

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 DOES NOT PRECLUDE A FEDERAL COMMON LAW RIGHT TO CONTRIBUTION BY A PARTY HELD LIABLE UNDER THE TITLE AGAINST A PERSON WHO WAS NOT THE SUBJECT OF A TITLE VII CHARGE.

A. Standards for Resolving the Issue.

Northwest asserts that it may maintain an action for contribution against the unions because, it alleges, they were jointly responsible for the violations of Title VII for which Northwest has been held liable and, for that reason, they are jointly liable under the Title. There is no question that Title VII creates joint liability where several parties are responsible for the same violation. [Citations omitted.]

* * * *

* * * All that is required for the existence of such a right is [p. 20] that the injured party (the original plaintiff) could initially have proceeded against the party from whom contribution is sought [p. 21] as well as the defendant against whom it chose to proceed. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974); *Keleket X-Ray Corp.* v. *United States*, 107 U.S. App. D.C. 138, 275 F.2d 167, 169 (1960); [citation omitted].

* * * *

The defendant unions contend, essentially, that Northwest cannot sue them for contribution because the plaintiffs in *Laffey* could not have done so, since the *Laffey* plaintiffs did not name them in an EEOC charge, as required by section 706(f)(1) of Title VII. The unions do not dispute that the *Laffey* plaintiffs could have named them in EEOC charges. Such an argument [p. 22] would be untenable, since Title VII prohibits labor organizations from in any way discriminating against individuals on the basis of, *inter alia*, sex, and also from causing employers to do so. [Footnotes omitted.]

* * * *

1. **A right to contribution for violation of a federal statute may be recognized where to do so is consistent with the substantive and remedial purposes of the statute involved.** [p. 23]

* * * *

Thus, under the relevant authority, it seems clear that the issue of whether or not it is appropriate to recognize a right of contribution for a violation of Title VII should be resolved by reference to the substantive and remedial polices of the Title. As indicated, the district court in this case concluded that recognizing such a right would serve the policies of Title VII. (App. 45-47). As set forth below, pp. 39-44, we agree with the district court's assessment.[13] [p. 28]

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[13] The district court specifically reserved the question of whether Northwest's conduct with respect to the violations in question here constituted the sort of willful violation for which it would be inappropriate to permit contribution (App. 48). We, therefore, will not address that issue.

At one point in appellant ALPA's brief (p. 22 n.*), however, the union appears to be suggesting that Title VII should defeat a right of contribution, stating (apparently in support of that suggestion) that the same sort of intent is required under Title VII as under the antitrust acts. But, as this Court made very clear in *George's Radio Inc.* v. *Capitol Transit Co., supra,* 75 U.S.App.D.C. at 189, 126 F.2d at 221, the kind of violation for which contribution should be denied involves "wilful wrongdoers or those guilty of flagrantly wrongful conduct . . . ." Under Title VII, however, "good intent or absence of discriminatory intent does not redeem employment procedures [with discriminatory consequences]." *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 432 (1971).

ALPA's reliance on the sort of intent required under the antitrust statutes is puzzling. For, as indicated above, p. 26, the intent relevant to whether contribution should be permitted for any violation of that statute is the intent of Congress in enacting the remedial scheme (*i.e.,* whether it is a punitive scheme), rather than the intent of violators subject to the provisions of those statutes.

2. A federal common law right to contribution may be asserted where there is no clear congressional intent to preclude such a cause of action. [p. 29]

* * * *

a. Contribution claims can be maintained at federal common law under 28 U.S.C. § 1331.

* * * *

* * * There is no question that the right to contribution for [p. 30] violations of Title VII asserted by Northwest, involving as it does the policies expressed in the Title, constitutes an area of special federal concern. [Citation and footnote omitted.]

Nor is there any question that, where a federal common law right is asserted, jurisdiction may be based on § 1331.***

Furthermore, as the district court noted, "the modern trend [p. 31] . . . has been to recognize a right to contribution under federal law." (App. 41). ***

* * * *

b. A common law claim will be recognized in an area covered by a federal statute unless the statute manifests a clear intent to preclude such claims. [p. 34]

* * * *

As discussed below, pp. 45-46, in enacting Title VII, [p. 35] Congress manifested an analogous intent not to displace other causes of action which might exist with respect to employment discrimination. Furthermore, no congressional intent to pre- [p. 36] clude the particular cause of action asserted here—a common law right to equitable contribution—can be inferred, since there is no necessary inconsistency between the existence of such a right and the statutory scheme of the Title. For, as discussed below, pp. 47-48, in requesting contribution, a defendant is not asserting that there has been a violation of Title VII with respect to itself, but is instead asserting an equitable right to be

reimbursed for a financial loss it suffers due to the unlawful conduct of the party from whom contribution is sought. Since it is not asserting a violation of the Title, the procedural requirements of Title VII are simply inapplicable to such a claim, rather than inconsistent therewith.[17] Therefore, there is nothing in Title VII that precludes the recognition of a common law right to contribution for violations of the statute.

* * * *

B. A Federal Common Law Right To Contribution For Title VII Liability Is Fully Consistent With The Substantive Policies And Goals Of Title VII. [p. 39]

The express terms of Title VII itself demonstrate a congressional intention that a union be held financially liable where it

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[17] Thus, in our view, the absence of inconsistency between Title VII and a common law right of contribution arises from the nature of a claim for contribution, and does not depend on whether the party seeking contribution can also file a charge alleging that the party from whom contribution is sought violated Title VII with respect to it. *See* pp. 47-48, 68-74, *infra.*

Although not so stated, appellant ALPA's argument apparently depends on Northwest's inability to file a charge. As stated, ALPA argues: 1)Northwest cannot file a charge under Title VII (ALPA Br., pp. 10-11) and therefore cannot invoke jurisdiction under Title VII (*id.*, pp. 11-12), but 2) Northwest cannot invoke jurisdiction under a different statute because it has not filed a charge under Title VII (*id.*, [p. 37] pp. 17, 19). *See generally* J. Heller, *Catch-22* (Simon and Schuster 1961).

Presumably ALPA is arguing that, since employers cannot invoke Title VII, they cannot invoke the jurisdiction of the courts concerning Title VII liability under other statutes. This argument depends on blurring the distinction between claims asserting violations of Title VII and claims in which Title VII liability is involved. *See* discussion *infra* at pp. 47-48; *Cf. Dawson* v. *Contractors Transport Co., supra,* 151 U.S.App.D.C. at 406, 467 F. 2d at 732.

In any event, as noted below, it is our position that companies can file charges under Title VII in certain circumstances. *See* p. 67 & n.30, *infra.*

shares responsibility with an employer for an unlawful employment practice.[18] The provisions of Section 703 impose liability on a union, not only for its own discrimination, but also for causing employer violations of the statute. Section 703(c)(3) specifically states that it is unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." 42 U.S.C. §2000e-2(c)(3). Furthermore, section 706(g) of Title VII expressly indicates that the party "responsible" for an unlawful practice should be required to pay damages, and that labor organizations should bear such liability to the extent that they may be responsible for the unlawful practices. Specifically, section 706(g) authorizes a court to order "back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) . . . ." 42 U.S.C. §2000e-5(g). Thus, sections 703(c)(3) and 706(g) both reflect a statutory policy that monetary relief be borne by a union to the extent that it is responsible for a violation of Title VII. Clearly, a right of contribution promotes that policy. [p. 40]

In addition, the remedial provisions of section 706(g), which authorize, *inter alia*, "any . . . equitable relief" which "the court deems appropriate", demonstrate a congressional intent that all forms of equitable relief regarding Title VII violations be utilized where appropriate. It is consistent with this policy to recognize a claim for contribution, which "sounds in equity" and is based on principles of fairness and justice. *Jones* v. *Schramm, supra*, 141 U.S. App.D.C. 171, 435 F.2d at 901.

Not only does contribution further the policies evident on the face of Title VII, but it significantly enhances the underlying goals of the statute, as made clear in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975). *** It is only through a [p. 41]

[18] As discussed above, the case law has long recognized union liability where a union is jointly responsible for a Title VII violation. *See* cases cited *supra* at p. 19.

rule allowing contribution that back pay liability, can be "reasonably certain". For otherwise, liability could often be escaped by those whom victims failed, either by ignorance or design, to name in a charge. As the district court explained, under a rule of contribution "[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue will not insure either immunity from the mandates of the law." (App. 47-48).

* * * *

* * * Recognizing the importance of deterring union discrimination in particular, the Supreme Court fashioned a rule analogous to contribution in *Vaca* v. *Sipes*, 386 U.S. 171, 187-88, 196-97 (1967), requiring that liability be apportioned according to relative responsibility for damages caused by an employer's breach of a collective bargaining agreement and a union's breach of its duty of fair representation. As the Court stated, under a contrary rule, "the employer would be compelled by the court to pay for the union's wrong—slight deterrence, indeed, to future union misconduct. . . ." 386 U.S. at 187. [p. 42] [p. 43]

Thus, there can be little doubt that recognition of a right to contribution will further the enforcement of Title VII. And, indeed, most courts to have considered the question have held that defendant employers in Title VII cases may assert claims for contribution against labor organizations which were not named in an EEOC charge. [Footnote and citations omitted.]

* * * *

C. A Right To Contribution Is Consistent With The Congressional Intent And The Statutory Scheme Of Title VII. [p. 45]

Although Congress in Title VII designed an elaborate system for administratively and, if necessary, judicially resolving complaints of discrimination, both the legislative history

and the case law establish that the statute was not intended to preclude other claims based on the same unlawful conduct. ***

Therefore, it is clear that Congress did not intend that the procedural restrictions of Title VII would cut off separate actions reaching third parties, where such an action serves to eliminate employment discrimination. As discussed *supra*, the existence of a common law right to contribution significantly serves that policy. [p. 46]

The case law, too, establishes that Title VII does not preclude actions asserting rights under other law, even though the actions arise from the same conduct made unlawful under Title VII. [Citations omitted.]

Nor can it be inferred that claims for contribution should constitute an exception to this policy. There is no necessary inconsistency between the statutory scheme of Title VII and a right to contribution against third parties, as the unions imply. This is because a cause of action for contribution is distinctly separate from, and involves different rights than, a cause of action under Title VII. [p. 47]

* * * *

The unions here contend, however, that failure to satisfy the charge-filing requirement of section 706 of Title VII precludes a claim for contribution. But section 706, by its terms, applies only to actions brought by the "person aggrieved" seeking a remedy for Title VII violations. It has no application whatsoever to the distinctly separate claim for contribution in which one wrongdoer asserts an equitable common law right to reimbursement from another wrongdoer. Therefore, nothing in that provision precludes, or conflicts with, the assertion of a claim for contribution by one joint violator of the Title against another. [p. 49]

* * * *

In sum, then, the legislative history of Title VII strongly supports the conclusion that it is entirely appropriate to recognize an independent right to contribution under federal common law for violations of Title VII; to do so does not conflict with the structure of the Title; and the authority cited by the unions simply does not support their contention that Title VII must be held to preclude such a claim. [p. 57]

* * * *

* * * It is also clear that the Commission may attempt to conciliate whenever necessary to obtain voluntary resolution of Title VII disputes from the fact that conciliation is only an "informal" process. *See* Section 706(b), 42 U.S.C. § 2000e-5(b), authorizing the Commission to attempt to eliminate unlawful practices by "informal methods of conference, conciliation, and persuasion." In fact, it is the Commission's standard procedure to conduct conciliation negotiations with a union if resolution of a charge involves changes in a collective bargaining agreement, even though the union has not been named in the charge.[26] [p. 64] [p. 65]

* * * *

There are means, in addition to that provided in section 705(g)(4), by which a person named in a charge can afford an alleged joint violator an opportunity for voluntary resolution through the offices of the EEOC. A party can request that a Commissioner of the EEOC file a charge against a third party [p. 66]

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[26] Section 62.7(c) of the EEOC Compliance Manual provides:

(c) *Assuring Involvement of Labor Organizations*—Where a Union is a co-respondent or where a change in a collective bargaining agreement is involved, conciliation efforts paralleling those with the company should be conducted with the Union. . . . At a later point, the parties may be brought together if the conciliator believes this will prove beneficial. [Equal Employment Opportunity Commission, *Compliance Procedures for Personnel of the Equal Employment Opportunity Commission* §62.7(c) (1977).]

whom it alleges has violated the statute. *See* Section 706(b), 42 U.S.C. § 2000e-5(b). [Footnote omitted.] In addition, since 1972, it has been possible to file a charge "on behalf of" persons aggrieved by the alleged discrimination. [Footnote omitted.] We also believe that, in certain circumstances, an employer may file a charge alleging that it has been unlawfully [p. 67 aggrieved by a violation of section 703(c)(3) (quoted *supra* at p. 22 n.9).[30]

We do not believe, however, that resort to any of these [p. 68 devices should be required prior to asserting a contribution claim.[31] A request for a Commissioner's charge would serve no function that could not be served as well by a request for conciliation under section 705(g)(4). [Footnote omitted.] A requirement that a company file a charge, either under section 703(c)(3) or on behalf of its employees, in order to assert a contribution claim would produce both conceptual and practical difficulties. Furthermore, each of the significant Title VII policies which might be served by such a requirement can be accommodated by alternative means.

It seems highly unlikely that the circumstances in which contribution would be appropriate would always constitute a

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[30] While the Commission had not found it necessary to take a position with respect to this issue prior to the Court's request for Commission participation in this case, it adopted the position stated in the text at a Commission meeting on May 30, 1978, when the issue was considered so that the most complete answer possible could be given to the question put in this Court's order of January 10, 1978. At the same meeting the Commission directed that further study be given to the implications of that position in varying circumstances.

* * * *

[31] The Commission has not established regularized procedures, by regulation or otherwise, by which a respondent may join a third party, which is not named in a formal charge of discrimination, as a "co-respondent" in proceedings before the EEOC. As noted above however (p. 65, *supra*), it has been the Commission's standard practice to join the union in conciliation efforts where the practices at issue involve a collective bargaining agreement.

violation of section 703(c)(3).[33] To the extent that the scope of [p. 69]
the right to contribution is not coextensive with the scope of conduct proscribed by that provision, the employer could not properly file a charge on its own behalf. For, as previously indicated, pp. 20, 47-48, in asserting a contribution claim, the employer is asserting only that it has been held solely financially responsible for harm caused by another. Such an allegation does not, in itself, allege a violation of Title VII with respect to the employer.

Certainly it would be anomalous to require an employer to file an "on behalf of" charge—which would have to allege that the same practices, for which it is jointly responsible and might be held liable, have unlawfully injured its employees—as a condition for asserting its right to contribution. It would seem that an employer should be able to defend the legality of its practices without reservation in an administrative process, such as that established by Title VII, which cannot finally determine the company's liability and which is intended to obviate the [p. 70]
need for any litigation concerning liability. Furthermore, such a requirement might entail increasing the risk that the company will itself be held liable. [Footnote omitted.] ***

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[33] Section 703(c)(3) contemplates that a union has caused the employer's violation. However, in some circumstances the joint liability may stem from conduct which cannot be characterized in causal terms, but instead more appropriately is in the nature of a joint venture. *See Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1381 (employer and union both participated in discrimination for their own reasons). *Cf. McDonald* v. *Santa Fe Trail Transportation Co.,* 427 U.S. 273, 284-85 (1976)(claim that union "joined in" the alleged discrimination).

CONCLUSION [p. 76]

This Court should hold that there is a right to contribution for financial liability incurred under Title VII. ***

Respectfully submitted,

ABNER W. SIBAL
General Counsel

* * * *

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

* * * *

June 1978

REPLY APPENDIX B

DISSENT OF COMMISSIONER J. CLAY SMITH, JR. RE: VOTE OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON THE ISSUES OF CONTRIBUTION UNDER TITLE VII AND THE EQUAL PAY ACT ON JULY 1, 1980*

The views of the members of the EEOC were requested on the above captioned issues by the Department of Justice. Justice will represent the interest of the U.S. Government in a matter before the Supreme Court raising the contribution issues.

On July 1, 1980, the General Counsel brought two major issues before the Commission for consideration and approval. In broad terms, the first issue presented was whether as a matter of policy the EEOC opposes the right of an employer to sue a union for contribution where both parties' joint conduct may result in a violation of Title VII. The second issue presented the same question as it relates to violations of the Equal Pay Act. On the first issue the majority voted not to support a policy of contribution (with Commissioners Smith and Walsh dissenting). On the second issue the majority voted not to support a policy of contribution (with Commissioner Smith, alone, dissenting). Because of the importance of these questions, I submit my views for the official minutes for association with my dissents and to be associated with any communications supported by the majority transmitted to the Department of Justice, or elsewhere.

BACKGROUND

Two years ago the Commission approved the General Counsel advancing the position that a party found guilty of violating Title VII had a right to contribution against any other

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* A copy of this dissenting opinion has been filed as an exhibit in support of plaintiff's motion for summary judgment in a pending suit under the Government in the Sunshine Act 5 U.S.C. §552b. *Northwest Airlines, Inc.* v. *Equal Employment Opportunity Commission et al.* (D.D.C. Civ. No. 80-2192).

party who participated in the wrong-doing. The Commission took this position in an *amicus curiae* brief in *Northwest Airlines, Inc.* v. *Transportation Workers Union of America,* 606 F.2d 1350 (D.C. Cir. 1979). Citing prominent authority, the EEOC's brief stated:

> "[G]eneral principles of justice require that in the case of a common obligation, the discharge of it by one of the obligors without proportionate payment from the other, gives the latter an advantage to which he is not equitably entitled." (Commission brief at p. 20)

Nothing has changed in law or in fact which warrants the Commission reversing this original position. Indeed, our position is stronger now than when the Commission first endorsed the principle of contribution since the only two Courts of Appeals which have considered the issue have both ruled that Title VII defendants have a right to contribution from other parties responsible for the discrimination. See *Northwest Airlines, Inc.* v. *Transportation Workers Union of America,* 606 F.2d 1350 (D.C. Cir. 1979) and *Glus* v. *Murphy,* ____ F.2d ____, (3rd Cir.) (No. 79-1507, 1508), decided June 27, 1980.

Both Courts of Appeals held that contribution furthers the mission of Title VII in eliminating invidious employment discrimination. The Title VII statutory scheme and EEOC implementing regulations were designed with the expectation that if a union jointly participates in an unlawful employment practice it would be held monetarily liable. See EEOC Compliance Manual, Sec. 201.5(b) (Employers as aggrieved persons).

In the *Glus* decision, *supra,* Judge A. Leon Higginbotham pointed out that the very terms of Title VII establish that unions are to be held financially liable with employers for unlawful acts. As his opinion points out, while Section 703(a) of Title VII, 42 U.S.C. 2000e-2(c)(3) holds a union liable not only for discriminatory actions in which it independently engages but also when it "cause[s] or attempt[s] to cause an employer to

discriminate against an individual. . . ." The backpay provision of Title VII, 42 U.S.C. 2000e-5(g) is applicable to unions and employers alike.

Judge Higginbotham opined:

> "These provisions reflect a statutory policy that the responsibility for monetary relief should be borne by both unions and employers to the extent that they are responsible for violations of Title VII. *A right of contribution would achieve this goal.* (emphasis added) In contrast, a holding that there is no right of contribution under Title VII would release some individuals from liability." *Glus* v. *Murphy, supra* at p. 14, slip opinion.

In addition to this language, Judge Higginbotham provided five other independent and important policy considerations supporting the majority opinion of the court which are too persuasive for me to cast my lot with the majority of the Commission on the Title VII issue:

1. *Policy: Joint Elimination of Discrimination.* Quoting *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-418 (1975), Judge Higginbotham stated,

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practice and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominous page in this country's history." *Id.* at 15 (slip opinion).

2. *Policy: Vigilance During Collective Bargaining.* Judge Higginbotham stated,

> Under a rule of contribution "[b]oth union and employer will know that they both must be vigilant to eschew unlawful discrimination and that the employee's predilections as to whom to sue *will not insure either immunity* from the mandates of the law." *Ibid.* (emphasis added)

3. *Policy: Contribution Favors Conciliation.* Judge Higginbotham stated,

> A right of contribution would also serve the Title VII policy of favoring conciliation and settlement of these claims. "[C]ooperation and voluntary compliance . . . [a]re the preferred means for achieving" the goal of equality of employment opportunities. *Ibid.*

4. *Policy: Prevents Unjust Enrichment.* Judge Higginbotham stated,

> Further, the contribution rule prevents a plaintiff from becoming unjustly enriched either by collusive activity with one of the defendants, or by threatening one defendant that the suit will be brought only against it, thereby forcing an unjustified settlement. *Id.* at 16.

5. *Policy: Contribution is Consistent with Congressional Intent.* Judge Higginbotham stated,

> A right of contribution would implement the congressional intent to hold both unions and employers liable for unlawful employment practice and would aid the conciliation and settlement goals of Title VII. *Ibid.*

Historically, the Commission has successfully argued in the Appellate Courts that the backpay provision of Title VII is prophylactic. See *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). By that I mean backpay is a preventative tool. When an employer or union becomes aware that other institutions are making backpay awards for violations of anti-discrimination statutes, these persons have notice that if they violate the law, they too are reasonably certain to be subject to monetary liability. Under contribution, unions as well as employers recognize that they have to actively work to eliminate discrimination because even if no charge is filed against it, a party to a collective bargaining agreement can still seek contribution from the other for past violations of law. Absent contribution, if a union is not charged because of lack of knowledge, inadvertence or design, the union may enjoy immunity.

The Commission majority reasoned, *inter alia,* that contribution is inconsistent with the fact that some unions may aid the Commission in proving employer violations. Implicit in the majority's argument is the assumption that unions aid charging parties and the Commission in eliminating discrimination. However, as the history of Title VII reveals, the majority of unions have not been in the vanguard in fighting discrimination. See, *United Steelworkers of America* v. *Weber,* 443 U.S. 36 (1979), which tolls against the position taken by the majority. The opening text of the *Weber* opinion (which the EEOC applauded) states: that "blacks [have] long been excluded from craft unions[1] . . . ." Footnote 1 is revealing:

> [1] Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice. See, e.g., *United States* v. *International Union of Elevator Contractors,* 538 F. 2d 1012, (CA3 1976); *Associated General Contractors of Massachusetts* v. *Alshuler,* 490 F.2d 9 (CA1 1973); *Southern Illinois Builders Association* v. *Ogilve,* 471 F.2d 680, (CA7 1972); *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor,* 442 F.2d 159, (CA3 1971); *Local 53 of International Association of Heat & Frost, etc.* v. *Vogler,* 407 F.2d 1047, (CA5 1969); *Buckner* v. *Goodyear,* 339 F.Supp. 1108, (ND, Ala. 1972), aff'd without opinion, 475 F.2d 1287, (CA5 1973). See also, United States Commission on Civil Rights, *The Challenge Ahead: Equal Opportunity in Referral Unions* 58-94 (1976), (summarizing judicial findings of discrimination by craft unions); G. Myrdal, *An American Dilemma* (1944) 1079-1124; R. Marshall and V. Briggs, *The Negro and Apprenticeship* (1967); S. Spero and A. Harris, *The Black Worker* (1931); United States Commission on Civil Rights, Employment 97 (1961). State Advisory Committee, United States Commission on Civil Rights, 50 States Report 209 (1961); Marshall, "The Negro in Southern Unions," in *The Negro and the American Labor*

Movement (ed. Jacobson, Anchor 1968) p. 145; App. 63, 104."

See also, R. C. Weaver, *Negro Labor* (Harcourt, Brace & Co., N.Y., 1946); Norgren, Webster, et al., *Employing The Negro In American Industry* (Industrial Relations Counselors, Inc., N.Y., 1959) (Mono. No. 17); Van Deusen, *The Black Man in White America* (The Associated Pub., Inc. 1938) (with particular reference to Chaps. V and VI).

The fact of the matter is that there are some unions which are good on equal employment opportunity issues and some which are bad. Norgren, Webster, *Employing The Negro In American Industry, supra* at 145; Marshall & Briggs, *The Negro and Apprenticeship,* cited in *United Steelworkers of America* v. *Weber, supra* 35, n.1. Simple justice demands, the principles of equity cry out, and the badges of history urge that no party to a collective bargaining agreement which violates the law should be placed in a preferred status as a matter of administrative discretion, equity or distributive justice in connection with the contribution issue. As applied to unions, that is what both United States Courts of Appeals which have considered the issue have ruled; that was the Commission's and the General Counsel's original position; and that is what makes the most sense in the fair and effective enforcement of Title VII and other anti-discrimination statutes. Any other result impedes justice and rewards the most discriminatory and recalcitrant unions which for one reason or another have not been sued by the charging party. Civil Rights policy considerations weigh heavily in favor of the principle of contribution. Accordingly, I

respectfully dissent from the majority's position to restrict the right.*

/s/ J. Clay Smith, Jr.

J. Clay Smith, Jr.
Commissioner
July 7, 1980

cc: The Commissioners
General Counsel
Executive Secretariat

* Based upon principles of equity, the view expressed above is the reason why I dissented on the contribution issue as it relates to the Equal Pay Act. It is within the general equitable powers of the Federal courts to impose joint and several liability on a union or employer for violation of the Fair Labor Standards Act.